GAN CHEE MING

v.

TN FORKLIFT HOLDINGS SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R2-25-129-99]
12 SEPTEMBER 2000

LABOUR LAW: *Employment - Dismissal - Whether claimant failed to make application for leave in advance - Whether claimant's smearing of company's name after dismissal constituted misconduct - Whether dismissal with just cause or excuse*

ADMINISTRATIVE LAW: *Remedies - Certiorari and mandamus - Industrial Court award - Dismissal with just cause and excuse - Whether Industrial Court failed to take into account relevant evidence - Whether Industrial Court acted outside its jurisdiction*

This was an application for *certiorari* and *mandamus* in respect of a decision of the Industrial Court in which the applicant's claim for unfair dismissal by his employer company ('the company') was dismissed.

The issues were: (1) whether the applicant had infringed the company's rules by not making his application for leave in advance; (2) whether the applicant had smeared the company's name after his dismissal; and (3) whether the letters that were allegedly faxed by the applicant to smear the company's name after his dismissal should have been taken into account.

Held:

[1] In respect of the issue of leave, the Industrial Court erred in law as it had failed to take into account the relevant evidence, and the law pertaining to proof in industrial matters. As the company had not proved whether or not the applicant had applied for leave earlier and whether that leave had been approved, the court should have found in favour of the applicant.

[2] In respect of the allegation that the applicant had smeared the company's name after the dismissal, the court had erred again. The court's jurisdiction was limited to deciding whether the company had just reasons to dismiss the employee at the time of dismissal. Remarks made after the dismissal was not a misconduct, and could not be used as a justification for the previous dismissal.

[3] In respect of the disputed letters that were allegedly faxed by the applicant to smear the company's name, they should not have been taken into account since the letters were only brought to the company's attention after the dismissal and therefore could not have formed the basis of the dismissal itself.

[4] The Industrial Court had erred in arriving at its decision, and had acted outside its jurisdiction. Since it was clear that the court had acted on inconclusive and irrelevant evidence, that was a sufficient ground to quash the award.

[Application allowed.]

Case(s) referred to:
George Kent (M) Sdn Bhd v. Steven Koh Hon Seng [1995] 2 ILR 465 ***(refd)***
Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd [1981] 2 MLJ 129 ***(refd)***
R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(refd)***
TN Forklift Holdings Sdn Bhd v. Gan Chee Ming [1999] 3 ILR 270 ***(refd)***

For the applicant - S Shanker; M/s S Shanker & Assoc
For the respondent - Gana Muthusamy; M/s Gana Muthusamy & Co

Reported by Suresh Nathan

JUDGMENT

Faiza Tamby Chik J:

This is an application for the orders of *certiorari* and *mandamus* in respect of Industrial Court Award No. 620 of 1999, made in Case No. 7/4-314/1998. The brief facts are as follows: The applicant commenced employment with the 1st respondent (hereinafter referred to as 'the company') as a sales executive, with effect from 17 January 1997. By a letter dated 30 September 1997 the company dismissed the applicant from service. The contents of the letter are as follows:

> Due to various verbal warning as well as two (2) written warning you have chose to ignore the Company's regulations. You have even threaten to smear the Company image to the public place. I am afraid that the TN Forklift Holdings Sdn. Bhd. have taken this threat seriously and therefore you have been terminated as a Sales Executive from this establishment from today. You will be paid a month salary *in lieu* to your termination. This will be paid to you after all your income tax has been cleared.
>
> You will not be allowed to trade under the TN Forklift Holdings Sdn. Bhd. name or do any transaction under the name. Serious action will be taken against you if these incident occurs.

The above letter was dated 30 September 1997. The two warning letters referred therein were dated 18 September 1997 and 27 September 1997, and can be found on pp. 96 and 97 of the affidavit of Shanker Subbramaniam, dated 30 March 2000 (hereinafter referred to as the second affidavit). The matter was referred to the Industrial Court, and Award No. 620 of 1999 was handed down, dismissing the applicant's claim that he had been unfairly dismissed. This award is being impugned now.

Ground 1

> The second Respondent, in arriving at the decision that the Applicant was guilty under charges 1 and 2, committed an error of law and acted outside its jurisdiction when it failed to take into account or give due consideration to relevant facts and/or it arrived at an unreasonable decision that would not have been reached by any other tribunal or body similarly circumstanced.

The Industrial Court broke up the charges against the applicant into 5. The 1st charge is concerning annual leave, whereby the company contended that the applicant had been warned for infringing the company's rules by not making his application for leave three days in advance. The company's pleadings in respect of this charge are on para. 6 of the statement in reply (p. 17 of lampiran 3). According to the company the claimant had, on 15 September 1997, submitted leave applications for 16 and 17 September 1997. The application was supposedly rejected. The company claimed that the applicant absented himself on 16 September 1997. The applicant was issued a warning letter on 18 September 1997 (p. 96 of 2nd affidavit). The applicant contended that he had submitted the application for leave much earlier than on 15 September 1997, and that one day's leave, *ie*, on 16 September 1997, had been approved. The manager (COW1) had in fact signed in the approved column. COW1 claimed in court that he had written "not approved", but it is clear from the document itself that these words had been crossed out.

The relevant form is on p. 101 of the 2nd affidavit. The Industrial Court made a finding (on p. 3 of the award) that the reason for the words "not approved" being cancelled out was not explained by COW1. The court went on to observe as follows (p. 3 of the award, p. 52 of lampiran 3):

> This particular exhibit [COA11 (A)] is not helpful to the Court, because if "Not Approved" has not deleted, it will be clear to the Court that COW1 has not approved the leave. The Court is not able to make a definite conclusion on who really tampered or deleted the "Not Approved" on COA11(a). The Court also noted that it could not accept the Applicant's contention that he had left the date on the application blank.

The passages from the award shows that, on the evidence before it, the Industrial Court did not arrive at a conclusion as to whether or not the leave was in fact approved. It is trite law that the burden is on the company to prove that the workmen had committed a misconduct. In *Goon Kwee Phoy v. J & P Coats (M) Sdn Bhd* [1981] 2 MLJ 129 the Federal Court held at p. 136:

> We do see any material difference between a termination of the contract employment by due notice and a unilateral dismissal of summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for inquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

Therefore if the company cannot prove its case, the court must arrive at a finding in favour of the workman. It cannot find another reason to support the company. Based on this basic aspect of Industrial law the Industrial Court ought to have arrived at a decision in favour of the applicant in respect of the "leave issue". Instead the court took into consideration an irrelevant fact, *ie*, that the applicant had supposedly previously made an appointment on 16 September 1997 with a customer, and because that said customer had written a cancellation of their order *vide* a letter dated 8 September 1997, the court went on to hold as follows:

> The Claimant, on the other hand, could merely aver that there was no such appointment without any convincing reason. It might be pure speculation to state that perhaps the Claimant was himself trying to avoid seeing the client. Because of this issue, the Court will therefore believe the Company also on the leave issue earlier explained by COW1.

It is clear that the court fell into error. First, the court had shifted the burden to the applicant by stating that the applicant "could merely aver" that there was no appointment on 16 September 1997. The court seems to have forgotten two points. First, if indeed, as the applicant stated, there was no meeting fixed on 16 September 1997, there would naturally be nothing for the applicant to do except aver to that fact. The applicant could surely not be expected to produce documentary evidence to prove a negative, *ie*, that there was no meeting? It is the company that should have provided documentary evidence

to prove that the applicant had fixed a meeting on 16 September 1997. No such evidence was produced. The letter of cancellation dated 8 September 1997 is not evidence that a meeting had been fixed specifically on 16 September 1997 and that the applicant had to attend this meeting.

The court had not, therefore, acted on the evidence in accordance with the *Goon Kwee Phoy* case. It should also be pointed out that the court itself had noted, on (p. 4 of the award), that there should have been a specific warning to the applicant if he had missed a meeting with a client on 16 September 1997. The company did not do this. Secondly, the court seems to have forgotten that the leave application form has the words "not approved" deleted. The form also shows that the number of days approved was one day, *ie*, 16 September 1997, instead of two days as originally applied by the applicant. The court seems to be unsure as to whether leave was in fact approved, and it depends on speculation in arriving at its conclusion that leave was not granted. As stated before, in arriving at this conclusion the court erred in law as it failed to take into account the relevant evidence, and the law pertaining to the burden of proof in industrial matter. It should be noted also that the company did not dismiss the applicant at this point. The company issued a warning letter about the alleged absence (p. 29 of lampiran 1). The company cannot therefore depend on this issue to dismiss the applicant on 30 September 1997. The Industrial Court failed to observe this basic point. Before going to the next ground it should be noted here that not even in the dismissal letter did the company state that the applicant had missed a meeting on 16 September 1997. The dismissal did not state the alleged absence on 16 September 1997 as the reason for the dismissal. The reason for dismissal given by the company in the dismissal letter was that the applicant had threatened to smear the company's image. The issue about the alleged absence should not therefore be a ground for the dismissal itself. In short, the court arrived at a conclusion that no reasonable body would have arrived at, bearing in mind the quality of evidence before the court. The court went on to consider the 3rd and 4th allegations against the applicant. The 3rd was that the applicant had not maintained his punch cards, and the 4th was that the applicant had been performing poorly. Here the court found in favour of the applicant on the basis that there was insufficient evidence to prove the allegation. Here the court gave the "benefit of the doubt in favour of the claimant." I am of the view that the same benefit ought to be given to the applicant in all the other issues, as is required by law.

Second Ground

The 2nd Respondent arrived at a decision that was unreasonable and perverse when it arrived at a decision that the Applicant was guilty under allegation

> No. 5, because the said decision is contrary to the evidence before the Industrial Court. The Industrial Court therefore erred in law and acted outside its jurisdiction.

Allegation No. 5 is considered by the court at p. 7 of the award, (p. 56 of encl. 1). The allegation is that the applicant had smeared the company's name after the dismissal. The court noted as follows:

> This amounts to a very serious allegation leveled at the Claimant by the Company, and since it purportedly happened during post termination period, the Court has to be circumspect and cautious to evaluate the evidence in this regard.

The allegation depended on a letter which was received by the company after the applicant's dismissal. It is trite that the Industrial Court's jurisdiction is limited to deciding whether the company had just reasons to dismiss the employee at the time of dismissal. The company cannot depend on events after the dismissal to justify the dismissal. It is also trite that after dismissal, the employee is no longer bound to comply with the requirements of the contract of service for the basic reason that after dismissal the contract no longer exists. The employee is therefore no longer bound to protect the interests of its former employer. If, therefore, the workman made remarks about the company after the dismissal, this cannot be construed as being a misconduct during employment. It cannot be justification for the previously occurring dismissal. If the remarks were defamatory in nature, the onus was on the company to bring a civil suit and prove defamation. The company did not do this in the instant case. The Industrial Court erred on this very basic point of law. It wrongly considered the alleged letters as being a misconduct, which it clearly was not. In fact, it was clear from the evidence that it was inconclusive as to whether the applicant had in fact used the said letters against the company. The applicant denied that he threatened to smear the company's image, and he denied faxing the said letter. He even denied owning a fax machine in his house (p. 57 of 2nd affidavit). The chairman failed to take into account the following pieces of evidence from the testimony of the company's first witness in the award (at p. 23 of 2nd affidavit 11):

> Claimant said "if you terminate me, I'll destroy the Company's image", it was a threat but did not tell me how it was serious.
>
> I don't have any idea if he did damage the Company's image when he was still in the Company.
>
> I cannot state for sure if he did smear the Company because the letters he wrote were discovered later.
>
> In my knowledge he did not smear Company's name whilst in the Company.

The applicant denied making the threats, and it seemed from COW1's testimony that the threat was allegedly made after COW1 said he would dismiss the applicant. It would therefore have been made in the heat of the moment after the applicant was told that he would be dismissed, which dismissal the applicant thought was unfair. The chairman did not consider this point when he accepted the company's testimony that the applicant had made the threats. He did not consider the fact that the decision to dismiss the applicant had probably already been made at this point. The chairman also failed to take into consideration the fact that the company had, within a period of two weeks given the applicant two warning letters, and then dismissed him. This pointed to an effort by the company to 'build a case' against the applicant. The 'trouble' only began after COW1 joined the company on 1 September 1997 (see p. 6 of 2nd affidavit). Prior to 1 September 1997 the applicant did not receive any warning letters at all. The fact that the applicant's dismissal may have been engineered by COW1 was not considered by the Industrial Court. The court also failed to take into account the evidence of COW2 (Othman), the sales manager in Telekom Malaysia in respect of the usage of a fax machine from the applicant's house to send the disputed letter. COW2 stated as follows (p. 35 of second affidavit):

> I cannot prove conclusively whether Gan Chee Meng did not use fax facility via telephone line.
>
> Yes, I cannot confirm, one way or another.
>
> From my experience the heading or title can be changed or programmed.
>
> The sender of fax cannot change the number of the telephone line that is fixed.
>
> The telephone line number cannot be changed when sending the fax machine.
>
> Telekom never supply fax machine, so I am not familiar. Only supplier of machines will know.
>
> CLA12 This document 6032914228 is the Industrial Court fax number. There are fax machines in the market which can change numbers different from the telephone line number.

There was therefore inconclusive evidence as to whether the applicant did in fact send the letters concerned. It is observed that two things were clear. First, the company's own evidence was that the applicant did not smear the company while in service. Second, it was not conclusively proven that he did so even after the dismissal. The Industrial Court, notwithstanding its own statements that it should be careful to consider the evidence, went on to hold as follows:

> Although these were received by COW1 after the Claimant's termination, it conclusively correlates back to the incident on the day of his termination, when the Claimant had threatened to smear the Company's reputations at the height

> of COW1's arguments with the Claimant on 30th September 1997. It is clear that he had carried his intentions through. On closer scrutiny, the date 24th September 1997, 11.30 (imprinted) on the top of the fax copies, might actually prove that he had already done it before termination, although the Court cannot be very certain of this.

It can be seen that the Industrial Court had again, confused itself. The company did not allege that the applicant smeared its name before the dismissal. According to COW1 the applicant only threatened to smear the company if he was dismissed, and this was on 30 September 1997. Why, then did the court take into account this matter, which was clearly a factor in the court's mind when it arrived at its decision.

Third Ground

> The Second Respondent erred in law and acted outside its jurisdiction when it arrived at the decision that the Applicant's dismissal was fair and reasonable when the Second Respondent took into account documents that were received by the First Respondent after the Applicant's dismissal. The Industrial Court should only take into account facts prior to the Applicant's dismissal.

This ground is linked to ground 2. The court took into account the disputed letters that were allegedly faxed by the applicant to smear the company notwithstanding the fact that these letters were only brought to the company's attention after the dismissal. They cannot therefore form the basis of the dismissal itself. This was clearly an error of law by the Industrial Court. In the case of *George Kent (M) Sdn Bhd v. Steven Koh Hon Seng* [1995] 2 ILR 465, the workman was dismissed. Subsequent to his dismissal the employer found out that he had committed a serious misconduct prior to the dismissal. The court held that a misconduct that was discovered subsequent to the dismissal was irrelevant to the issue of whether the dismissal was with just cause. This was because the employer was bound to prove its reasons for dismissal based on its knowledge at the time of dismissal, and not after the dismissal. The court could, however take into account misconduct which occurred prior to the dismissal, but which was discovered subsequently, to determine the quantum of compensation. At p. 468 - 469 the court said:

> It is also settled that in awarding the appropriate compensation the Court is entitled to take into account the claimant's contributory fault which resulted in his dismissal and the amount of compensation to be reduced accordingly. I am also of the view that evidence of misconduct which comes to light only after dismissal cannot be used to justify dismissal but is relevant to the question of reinstatement and the amount of compensation.
>
> ...
>
> ...

Although it is not statutorily provided where the claimant has caused or contributed to his dismissal the compensation can be reduced. I am of the view, because of the wording of s. 30(5) of the Industrial Relations Act 1967, this Court has jurisdiction to reduce the quantum taking into consideration the misconduct of the claimant. In *Hotel Jaya Puri Bhd. v. National Union of Hotel, Bar and Restaurant Workers & Anor* [1980] 1 MLJ 109, Salleh Abas FJ (as he then was) said at p. 112:

> If there is a legal basis for paying the compensation, the question of amount of course is very much a matter of the discretion with the Industrial Court fully empowered under s. 30 of the Industrial Relation Act to fix ...

His Lordship Justice Harun Hashim sitting as President of the Industrial Court in Practice Note 2 of 1981 stated:

> If the matter to which the claim relates was to any extent caused or contributed to by any action of the claimant, the Court may reduce the compensation to the extent it thinks just and equitable but not exceeding, 50%.
>
> ...
>
> ....
>
> From the evidence of the company's witnesses I have no doubt the claimant's past misconduct which the company was unaware of at the time of his dismissal, could not have formed part of the reasons for dismissing the claimant constructively. In my view, evidence of misconduct which has been discovered after an employee's dismissal is irrelevant and inadmissible in determining an employer's reasonableness for dismissing his employee. This is because an employee's past misconduct cannot have influenced the employer' action at the time of the dismissal.

Applying these principles to the instant case, it was clear that the Industrial Court erred in two ways. First, it was the company's own evidence that it discovered the "smearing" letters only after the dismissal. Therefore, even if the applicant had smeared the company before the dismissal, this cannot form the basis of dismissal. It could only be relevant for reduction in compensation (up to a maximum of 50%). Second, it was the company's own evidence that the applicant did not smear the company before dismissal. Therefore no misconduct took place at all! Even if the applicant smeared the company after dismissal (which was denied by the applicant), this is not a relevant issue for the Industrial Court. Therefore, the court should not even consider reduction as there was no prior misconduct. If at all the applicant did smear the company after the dismissal this should be a civil matter and not that of the Industrial

Court. The only evidence before the court was that the applicant had threatened to smear the company if he was dismissed (which the applicant also denied). The Industrial Court did not make a specific finding if this alone was sufficient to warrant dismissal. I am of the view that this alone cannot warrant dismissal because of the fact that the "threat" was allegedly made during an argument between COW1 and the applicant on the day of dismissal. The court completely failed to take into account the testimony of COW1 (at p. 48 of the 2nd affidavit) where he testified that there was a commotion on 30 September 1997 and the applicant was told to leave the office. CLW1, who was another employee at the material time, did not make any mention about the applicant threatening to smear the company. Based on the above, I am of the opinion that the Industrial Court erred in arriving at its decision, and acted outside its jurisdiction. At the very least the award was inadequate as it was clear that the Industrial Court acted on inconclusive, and sometimes irrelevant evidence. It is now settled that this ground is sufficient to quash an award of the Industrial Court. There are several authorities, but I need go no further than the case of *R. Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, and the *Goon Kwee Phoy*'s case, which were cited above. I think that a re-hearing of the case by another division of the Industrial Court was warranted in the circumstances. I therefore make an order in terms of (a), (b) and (d) of the application herein, with costs.